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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1980 TERM

GREY B. MORAN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED FOR REVIEW

Was the warrantless seizure of marijuana in the instant case done in violation of the Fourth Amendment to the United States Constitution?

STATEMENT OF FACTS

On October 18, 1979, within the City of Richmond, Virginia, William H. Wyrick, a member of the Richmond Bureau of Police (hereinafter referred to as "Wyrick"), observed the defendant stop his 1974 Datsun automobile in front of a house located at 3006 Fifth Avenue; the time was approximately 10:30 p.m. [At that time, the defendant, a white male, was on supervised probation pursuant to a felony conviction in Henrico County, Virginia, for the Distribution of 2115 grams (approximately 4.7 pounds) of Marijuana. He received a suspended sentence.] The defendant entered the house, stayed a short while, then exited in the company of a black male. The two men entered the defendant's automobile, whereupon the defendant made a U-turn in the middle of the street, drove a short distance, made a left turn and then parked the vehicle under a street light on the right hand side of the street at the corner of Burns and Dill Road (Tr. 62-64). Wyrick followed them, and when the defendant parked

his automobile, Wyrick assumed his observation point diagonally across from the defendant's vehicle (Tr. 64). Wyrick had become suspicious of the defendant's activities due to Wyrick's two and one-half years experience as a Vice detective; his suspicions were aroused because of the time of night coupled with a white male entering the home of a black male. He thought that the defendant was planning to purchase drugs from the black man (Tr. 63-64).

The defendant exited his vehicle, went up to a house situated on the corner, then shortly returned to his automobile, which had its headlights on. The defendant stooped in front of the left front fender, reached up under the bumper and pulled out a plastic bag, which the defendant proceeded to unroll; the bag appeared to be a twelve-inch square bag (Tr. 65). From his experience, Wyrick knew that marijuana was often packaged in that type of plastic bag, so he alerted another officer, Richard L. Acampora, (hereinafter referred to as "Acampora") and told him to head towards 3006 Fifth Avenue

and that Wyrick wanted to stop the vehicle (Tr. 65-66). The defendant had already stopped his car and was in the process of parking it when Wyrick and Acampora "swooped in" on them in front of 3006 Fifth Avenue, where the defendant had driven once he re-entered his vehicle (Tr. 43, 66). Wyrick exited his vehicle and went to the passenger side of the vehicle where William E. Brown (hereinafter referred to as "Brown"), the black male, removed a clear plastic bag containing a greenish-brown plant material from inside his jacket and placed it on the floorboard of the automobile, beside his right foot. Wyrick observed this from outside of the defendant's vehicle; the side window was raised (Tr. 66). The contents of the plastic bag appeared to Wyrick to be marijuana (Tr. 67). Wyrick then opened Brown's door, reached inside and picked up the plastic bag which was by Brown's foot, and then asked Brown to step out of the vehivle. Wyrick then placed Brown under arrest for Possession of Marijuana (Tr. 67-68).

Wyrick then went to the front of the vehicle where he had earlier seen the defendant remove the plastic bag from under the bumper (Tr. 68); this was done to determine whether any additional material was present of the type that the defendant had removed earlier. Wyrick shined his flashlight in the grille section of the defendant's vehicle and saw a clear plastic baggie containing a greenish plant material (Tr. 69). It took Wyrick a while to figure out how to get the itmes out from underneath the bumper, but he finally recovered two clear plastic baggies, each containing greenish-brown plant material; he also retrieved a brown paper bag which contained two clear plastic baggies, each containing greenish-brown plant material (Tr. 69-70, 88). Wyrick did not have to remove any part of the vehicle to observe the above-described items; all he had to do was shine his flashlight on the grille (Tr. 70).

The defendant was then asked to step out of his vehicle, at which time he was placed under arrest for Possession of Marijuana with

Intent to Distribute. As the defendant exited his vehicle, Acampora found yet another clear plastic baggie with greenish-brown plant material; this baggie was sticking out from under the defendant's driver's seat (Tr. 71).

Wyrick then looked under the automobile to ascertain whether any additional contraband was similarly secreted. He observed five additional plastic bags stuck inside the rear bumper in little holes (Tr. 71); these itmes were also in plain view when a flashlight was shone upon them. They had to be forced out of the bumper, however, as they were stuffed in there (Tr. 72).

At the suppression hearing, the defendant testified that he was forty-four years old, was married and the father of a twelve year old daughter and is a life insurance agent (Tr. 18); he further testified that he was a convicted felon (Tr. 45) and that the felony conviction related to a marijuana offense (Tr. 46). The defendant also testified that he had some marijuana in his vehicle on October 18, 1979 (Tr. 21); that there was no marijuana located

inside the automobile (tr. 24); that he had picked Brown up at his house at 3006 Fifth Avenue for the purpose of selling Brown some marijuana (Tr. 38-39); that when the police came up to his vehicle, Brown had already paid the defendant for the marijuana (Tr. 40); that the marijuana that was located in the front bumper was placed there by the defendant (Tr. 24); and that the marijuana in the front and rear bumpers belonged to him (Tr. 47).

A laboratory analysis of the seized items revealed the presence of 884 grams of Marijuana, just shy of two pounds (Tr. 143-145).

ARGUMENT

The defendant argues that since the police seized his marijuana without a warrant, the seizure violated the Fourth Amendment, and thus was illegal. Such a contention is clearly erroneous.

Being a good, alert police officer, Wyrick became suspicious when he saw a white male go into the home of a black male in a black neighborhood late at night. So he began to

keep a closer eye on the defendant's activities. His two and one-half years experience as a Vice Detective caused him to have even further suspicions when he observed the defendant drive a short distance, park his vehicle, get out leaving the black male inside the vehicle, go up to a house for a short while, and then return to the vehicle, stopping in front of it to remove a plastic bag containing a plant substance from under the front bumper, finally getting back into the vehicle, carrying the plastic bag he had removed from the bumper. In addition, Wyrick knew from his experience that marijuana is often packaged in plastic bags of the type which the defendant had.

At this point, Wyrick had probable cause to believe that the defendant's automobile contained marijuana. He also had probable cause to believe that the defendant had removed a bag containing marijuana from the front bumper of the automobile.

Having the above-mentioned probable cause, under the "Carroll Doctrine," Wyrick would have

had legal justification to search the vehicle without a warrant and without knowing any additional facts. Carroll v. United States, 267 U.S. 132 (1925). But Wyrick did not do that. Instead, as the defendant was parking his automobile, Wyrick and Acampora approached the vehicle. Wyrick went to the passenger's side of the vehicle, as he had originally thought that the defendant was the buyer. Upon arriving there, he observed Brown, the passenger, secrete a plastic bag containing marijuana on the floorboard next to his foot. All during this time, Wyrick was outside of the automobile. Wyrick then arrested Brown for the Possession of Marijuana.

At this juncture, after examining what he retrieved from the floorboard next to Brown's foot, Wyrick certainly had probable cause to believe that there was marijuana in the vehicle. His suspicions of minutes earlier were now confirmed by what he had in his hands. He had probable cause. As such, he could have held the automobile and presented his known facts to

a magistrate or he could carry out an immediate search of the vehicle without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment. Chambers v. Maroney, 399 U.S. 42, 51-52 (1970).

But Wyrick did not look inside of the automobile; instead, he went to the location on the vehicle where he had seen the defendant remove the plastic bag of marijuana: the front bumper. Once there, he did not do anything more than shine his flashlight on the vehicle's grille. That was all it took, for he was then able to see additional bags of marijuana. Although it took him a while to determine how to extricate that which he had found, Wyrick was able to seize the marijuana.

At this point, the defendant was asked to get out of the vehicle, and was placed under arrest for Possession of Marijuana with Intent to Distribute. As he was exiting the vehicle, even more marijuana was found, this time in plain view, sticking out from under the seat where he had been sitting. Then Wyrick went on

to look at the rear bumper, where a simple look revealed even more marijuana.

At his trial, the defendant vouched the record, after the trial court refused to allow him to testify as to a legal conclusion, that he had an expectation of privacy when he hid the marijuana in the bumpers. But his voucher is not legally sound. That is because courts have traditionally treated automobiles differently than other private property when such searches have been questioned. The rationale is twofold: first, the mobility of vehicles gives rise to exigent circumstances that make the warrant requirement impractical, Arkansas v. Sanders, 442 U.S. 753, 761 (1979); United States v. Chadwick, 433 U.S. 1, 12 (1977); Chambers v. Maroney, supra. at 49-50; Carroll v. United States, supra. at 153, and second, the public nature of vehicles and the history of vehicle inspection and regulation reduce the occupants' reasonable expectation of privacy. Arkansas v. Sanders, supra.; Rakas v. Illinois, 439 U.S. 128, 154 n.2 (1978); United States v. Chadwick,

supra. at 12-13; see Cady v. Dombrowski, 413 U.S. 433 (1973), where this Court said that

> "...'extensive and often non-criminal contact' with vehicles brings police into plain view of evidence, fruits or instrumentalities of crime, or contraband." at 442.

But in this case, it is most important to observe just where on the vehicle Wyrick looked for the marijuana. He did not look inside the vehicle, nor did he look in the glove compartment, nor did he look in the trunk, nor did he look in any container or package inside either the interior of the vehicle or the trunk; he looked at the bumpers of the vehicle, which can only be gotten to from the exterior of the vehicle. This Court's ruling in Cardwell v. Lewis, 417 U.S. 583 (1974), strikes home. In that case, police seized paint scrapings from the exterior of the car and examined a tire on one of the automobile's wheels. In upholding those actions done without a warrant, this Court stated that

". . . nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced into evidence. . . Stated simply, the invasion of privacy, if it can be said to exist, is abstract and theoretical. . . Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is <u>not unreasonable</u> under the Fourth and Fourteenth Amendments." 417 U.S. at 591-92. (Emphasis added.)

And such is the case here. By placing his marijuana in the bumpers of his vehicles, the Commonwealth of Virginia fails to comprehend what expectation of privacy was infringed. In fact, there could have been no legal expectation of privacy.

Wyrick acted prudently; he had probable cause, yet only seized items he saw from outside

the vehicle and he never searched the inside of the vehicle. As such, even though he did not have a search warrant, Wyrick's actions did not violate any of the defendant's Fourth or Fourteenth Amendment rights.

CONCLUSION

Since there has been no violation of any right guaranteed by the United States Constitution, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that forty true copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari were mailed to the Clerk's Office of the Supreme Court of the United States, and that three true copies of the same document were mailed, all postage prepaid, to Michael M. Morchower, Esquire, 13 East Franklin Street, Richmond, Virginia 23219, on this 6th day of August, 1981.

Stacy F. Garrett, III